United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2093

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 76-2093

ALFRED LEWIS,

Petitioner-Appellee,

-against-

ROBERT J. HENDERSON,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR RESPONDENT-APPELLANT

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POINT I

PETITIONER'S CONFESSION WAS NOT THE PRODUCT OF PHYSICAL COERCION

Petitioner-appellee's (hereinafter "petitioner) argument that his allegation of having been beaten is not

supported by the record. He testified below that "the major people involved in the beating was Walsh and Corbett." (H 19, see also 39-40*) and that it was "Corbett primarily" (H 32) who beat him. Detective Corbett denied beating the petitioner (H 86).

Petitioner, usually accompanied by an attorney, appeared in Court approximately 21 times before the start of his trial. Not until his third time in Court, on February 28, 1958, some 10 days after the alleged beating, did petitioner request a physical examination which was ordered by the Court (Minutes of February 28, 1958, pp 2, 6)**.

Dr. Joseph Karpowski, a physician at the Bronx House of Detention testified at trial (T 427)*** he examined the petitioner on February 19, 1958, the day after the alleged beating. Petitioner made no complaints to the doctor (T 431). No red marks were found on petitioner's abdomen (T 432). On February 26, 1958, petitioner complained to the doctor for the first time of pains in the chest and back which he stated resulted fron the beating of February 17. Petitioner complained again on February 28 (T 464) and again on March 3 but no

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* Page reference preceded by H refer to the District Court hearing held on April 5, 1976.

** Part of the record on appeal.

*** Page references preceded by "T" refer to the trial transcript, part of the record on appeal.

objective findings were made (T 465-67). No signs of bone fracture or dislocation were found (T 477-78).

The stenographer who took down petitioner's confession testified that for the forty-five minutes it took to record the confession he was from 3 1/2 to 4 feet from the petitioner and looked at him for about half of the time he was taking stenographic notes. Petitioner was in no way upset, and the stenographer noticed no marks on his face (T 531).

This Court correctly concluded before that the record fairly supports the finding of the Huntley Court that petitioner's confession was not the product of physical coercion. United States ex rel. Lewis v. Henderson, 520 F 2d 896, 903-04.

The minor discrepancies in the testimony of Detectives Corbett and Berkles are insufficient to overturn that finding. The Detectives testified in 1958 at the trial, in 1970 at a Huntley hearing, and again in 1976 at the evidentiary hearing below. Clearly any discrepancies are explained by the vast time periods involved.

Petitioner, on the other hand, chose not to take the stand at the State Huntley hearing. His attorney stated that

the petitioner requested him to state that the trial transcript related "to all of the pertinent parts that have to do with the voluntariness or involuntariness of his confession." (HA 35)*.

Petitioner presented two witnesses, one had been convicted for policy and possession of a hypodermic needle (HA 52), at the time of trial had not seen petitioner for five years (HA 53-54) and who by coincidence was at both station houses as petitioner at the same time(HA 47,48).

The other witness had six convictions for petty larceny (HA 105). He claimed to be the friend who went with petitioner to retrieve the money (HA 100) and claimed to have been under arrest at the time(HA 98) although testimony at trial indicated that the friend who retrieved the money with petitioner was brought to the station house at petitioner's request (T 397, 405).

Petitioner produced neither of these witnesses below. No where in the record below does he state why he did not produce these witnesses.

*Page references preceded by HA refer to the State Huntley Hearing, part of the record on appeal.

Petitioner was represented by counsel at trial, at the State Huntley hearing and at the evidentiary hearing below. Not once did he produce or subpoena any of the witnesses who he alleges beat him, even though the Huntley hearing was postponed several times so petitioner's two witnesses could appear.

The simple reason why the State made no attempt below to produce these alleged witnesses to the alleged beatings was that the issue had been precluded by this Court's prior decision and thus was not at issue below.

POINT II

PETITIONER WAS PSYCHOLOGICALLY FIT AT THE TIME OF HIS ARREST

Petitioner completely distorts the import of the psychiatric report made four months after his arrest. (Respondent's Exhibit A below; part of the record on appeal). The report speaks for itself. The two examining psychiatrists found that petitioner had "no clinical evidence of a psychosis." He was "of average intelligence", with no "definite delusions or paranoid system." Petitioner stated that "he did not feel he was mentally ill." There was "no clinical evidence of a

psychosis or mental deficiency." He was found to have a character disorder and to be a sociopath of the schizoid type who might "in time develop a psychotic reaction." (emphasis supplied).

This psychiatric report was never introduced by petitioner or mentioned by him until this Federal proceeding.

On August 19, 1958, just six months after arrest, the trial Court stated to petitioner's attorney, William Kunstler:

> "You realize that the psychiatrists contend that he is not in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge, indictment, proceedings or of making his defense. Do you wish to controvert that report?"

Mr. Kunstler replied, "I do not, your honor." (Minutes of August 19, 1958, p. 2, part of petitioner's exhibit's below and the record on appeal).

It is obvious that petitioner's claim with respect to his alleged psychological state has been totally unsupported by the evidence.

POINT III

THE BURDEN OF PROOF WAS ON PETITIONER

This Court in its prior opinion and remand clearly indicated that it was the petitioner's burden to prove the facts he alleged.

The Supreme Court has long held that in a habeas corpus proceeding, the burden is on the petitioner to prove, by a preponderance of the evidence, that his conviction was obtained by unconstitutional means. Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938); Walker v. Johnston, 312 U.S. 275, 286 (1941); Hawk v. Olson, 326 U.S. 265, 279 (1945).*

This Court characterized this burden as a "well established governing principle" in United States ex rel. Curtis v. Zelker, 466 F d 1092 (2d Cir., 1972) cert. den. 410 U.S. 945, and has often reiterated the principle, United States ex rel. Schuster v. Herold, 410 F. 2d 1071 (2d Cir., 1967) cert. den. 396 U.S. 847; United States ex rel. Fitzgerald v. LaVallee, 461 F. 2d 601 (2d Cir., 1973)

*Rogers v. Richmond, 365 U.S. 534(1961) did not change this burden. There, the Supreme Court remanded the issue of the voluntariness of the petitioner's confession back to the state court so that the state, of course, would have the burden of proof. Had the case remained in the federal courts, the burden of proof would have remained on the petitioner.

cert. den. 409 .S. 883; United States ex rel. Williams v. Deegan, 279 F. Supp. 53 (S.D.N.Y., 1967).

This burden has been placed on the petitioner even where he has alleged the use of a coerced confession. Cranor v. Gonzales, 226 F. 2d 83 9th Cir., 1955); Smith v. Lawrence, 128 F. 2d 822 5th Cir., 1942).*

The fact that this Court determined that the Huntley hearing provided petitioner was insufficient to satisfy the presumption of regularity of 28 U.S.C. § 2254(d) did not shift the burden to the State. This Court merely determined that the Huntley Hearing did not determine that petitioner's confession was not the product of mental coercion.

The conclusion is inescapable that Lewis was mandated to prove his claim.

In any event, even if it were the State's burden to prove petitioner's confession voluntarily, it must prove it voluntary only by a preponderance of the evidence. Lego v.

*Insofar as United States ex rel. Castro v. LaVallee, 282 F. Supp. 718 (S.D.N.Y. 1968) would place the burden on the state to prove the validity of a confession after a federal evidentiary hearing has been ordered, we maintain that it contradicts the well established principle in federal habeas corpus proceedings that the petitioner must establish that his conviction was unconstitutionally infirm.

Twomey, 404 U.S. 477 (1972). The record demonstrates that that burden has been met.

POINT IV

THE JURY CHARGE AT TRIAL DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS

Petitioner's argument that he was denied the right to have the jury instructed about the mental factors involved in his confession is without merit.

Petitioner fails to recognize that in Haynes v. Washington, 373 U.S. 503 (1963), decided before Jackson v. Denno, 378 U.S. 368 (1964), there had been no determination of the voluntariness of the confession independent of the ultimate issue of guilt. Here, a determination was made by the Court in a Huntley hearing that his confession was not the product of physical coercion. Petitioner has a right to a determination of the voluntariness of his confession, but does not have a rght to have that determination made by a jury. Lego v. Twomey, 404 U.S. 477, 489-90 (1972).

Thus, any error in the jury charge with respect to his confession is harmless, since he has no constitutional right under Lego v. Twomey to have that matter determined by a jury.

POINT V

THE POSITIVE PRE-STOVALL IDENTIFICATIONS OF PETITIONER BEFORE AND AT TRIAL WERE RELIABLE AND DID NOT VIOLATE DUE PROCESS OF LAW

The Court below found that "the eye-witness identification, while not perfect, were powerful independent evidence of petitioner's guilt" (Appendix pp 30-31). The Court also found that the in-court identifications did not violate due process and taint petitioner's conviction. See Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968)." (Appendix p. 36, p. 19). That finding is not clearly erroneous.

Identifications preceding Stovall v. Denno, 388 U.S. 293 (1967), as inthe instant case, are judged according to a general due process standard. Identification, even though possibly tainted by suggestive procedures, is not automatically excluded or deemed violative of due process. See, Simmons v. United States, supra. Stovall v. Denno, supra, states that the identification must be so impermissibly or unnecessarily suggestive as to give rise to a substantial likelihood of

misidentification. Mysholowsky . People of the State of New York, 535 F. 2d 194 (2d Cir., 1976).

Even where an identification procedure is found to be suggestive, the resulting identification, if based on reliable independent recollection, may comply with due process. This inquiry turns on the "totality of the circumstances" Neil v. Biggers, supra and involves an appraisal of such external factors as

> "the opportunity of the witness to view the criminal at the time of the crime; the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation." Neil v. Biggers, supra at 199.

Applying these factors to the case at bar, it is clear that the eyewitness identifications of petitioner at pretrial and at trial were reliable and devoid of any substantial likelihood of misidentification.

The testimony of the seven eye-witnesses at trial is set forth in appellant's main brief at pp 24-29.

As this Court stated in United States ex rel. Phipps v. Follette, 428 F. 2d 912, 916 (2d Cir. 1970) cert. den. 400 U.S. 908 (1970), "[h]is 20 to 30 second observation was much more than a fleeting glance, as anyone who watches the second hand of a clock sweep by for that period can attest."

The Courts have recognized that a victim as opposed to a casual bystander is more likely to take note of the perpetrator's face. Neil v. Biggers, supra at 200. Accord, United States v. Mims, 481 . 2d 636, 637 (2d Cir. 1973). Here all the witnesses were victims.

Thus each witness was able to view petitioner's unmasked face, in daylight, at very close range, and for a considerable length of time. They were provided with more than sufficient opportunity to see and remember his face. In fact, the length of time which almost all of these witnesses viewed petitioner is well beyond that which the courts have found sufficient for a reliable identification. United States ex rel. Phipps v. Follette, supra, (victim struggled with assailant only twenty or thirty seconds); United States v. Yanishefsky, 500 F. 2d 327 (2d Cir. 1974) (momentary viewing of the side of appellant's face); United States ex rel. Birt

v. Schubin, 498 F. 2d 396 (2d Cir. 1974) brief viewing of a fleeing robber by a fourteenyear old narcotics addict); United States ex rel. Cummings v. Zelker , 455 F. 2d 714 (2d Cir. 1972) (fifteen second observation).

The second factor to consider in determining reliability of identification is the witnesses prior description of the criminal. Here the descriptions of petitioner were sufficiently specific and with almost no variation.

The fact that the witnesses had sufficient opportunity to view petitioner was exhibited not only by their consistent descriptions of the robber but more so by their positive unequivocal identification of petitioner at the stationhouse.

The length of time between the crime and the lineup was comparatively short. Compare United States ex rel. Carnegie v. MacDougall, 422 F. 2d 353 (2d Cir. 1970), cert. denied, 388 U.S. 912 (identification evidence allowed where inter alia, a showup occurred three months after the crime). See also United States v. Casscles, 489 . 2d 20, 26 (2d Cir. 1973) cert. denied 416 U.S. 959 (1974).

The federal courts have found identifications to be reliable despite "suggestiveness" in cases much more glaring than the case at bar. In United States ex rel. Rutherford v. Deegan, 406 F. 2d 217, 219-220 (2d Cir. 1969), cert. denied 385 U.S. 936 (1970) the witness was told by the police that they had a suspect and asked her to come down and look at him. The witness viewed the suspect who was black, in a room with all white policemen. Despite the suggestiveness, the court found the identification reliable, considering the fact that the robber did not wear any disguise, the store was well lit, and the witness claimed she had watched him closely. Considering the same factors as those enunciated in the above case the federal courts have found reliable identifications despite suggestive procedures in scores of cases.

In United States ex rel. Pella v. Reid, 527 F. 2d 380 (2d Cir. 1975), a witness, who was intially unable to identify the defendant in a suggestive line-up, later made an identification from photographs of the same line-up. Despite any suggestiveness, the Court found the identification reliable. See also United States v. Mims , 481 F. 2d 636 (2d Cir. 1973); United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797 (2d Cir. 1973); United States ex rel. Phipps v. Follette,428 F. 2d 912 (2d Cir.) cert. den. 400 U.S. 908 (1970).

A final factor which the courts have considered in determining reliability is the extent of cross-examination by defense counsel. This factor is deemed particularly important because it insures that all the facts concerning alleged misidentification are before the jury. United States v. Casscles, supra at 26. Accord, United States v. Boston, 508 F. 2d 1171, 1178 (2d Cir. 1974). In the instant case defense counsel conducted extensive cross-examination. Every possible error or taint was delved into in great detail by defense counsel. Further, each witness was subjected to rigorous cross-examination as to the accuracy of his observations and the positiveness of his identification. Despite all this each witness remained steadfast in his identification of petitioner as the robber.

In this connection, it should be noted that the Supreme Court in Neil v. Biggers, supra, at 200, observed that Stovall was the first time the Court had served notice that suggestiveness of identification procedures was anything other than something to be argued to the jury. The instant case was long before Stovall.

POINT VI

THE INTRODUCTION OF THE CONFESSION WAS HARMLESS ERROR

In United States v. Tucker, 415 F. 2d 867 (2d Cir. 1969) this Court refused to remand the criminal proceeding for a new trial notwithstanding the introduction at the first trial of an allegedly coerced confession, because the other evidence of guilt would make another trial an "act of complete futility."

Here, even if the seven eye-witnesses could not be found, their testimony at the 1958 trial could be used to convict petitioner of the 1958 bank robbery. New York Criminal Procedure Law, Article 670. Requiring a retrial here would be an act of complete futility. Thus, even if petitioner's confession were the product of coercion, its introduction at trial was harmless beyond a reasonable doubt. We say this only arguendo because, as we have established, there was no basis for the challenge to the confession.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE PETITION DENIED IN ALL RESPECTS

Dated: New York, New York
October 22, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CAROL DONOHUE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellant herein. On the 22nd day of October , 1976, she served the annexed upon the following named person :

LAWRENCE STERN, ESQ.
11 Monroe Place
Brooklyn, N. Y. 11201

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Carol Donohue

Sworn to before me this
22nd day of October , 1976

David M Bird

Assistant Attorney General
of the State of New York